Washington University Journal of Law & Policy

Volume 48 *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution*

2015

The Use of Mediation to Resolve Community Disputes

Charles B. Craver
George Washington University Law School

The Use of Mediation to Resolve Community Disputes

Charles B. Craver*

I. INTRODUCTION

Disputes arise in communities quite frequently. Neighbors may disagree about the precise lines separating their properties, about property maintenance or design, about the propriety of a fence one is thinking of erecting, or about a similar issue. Landlords and tenants may have disputes regarding their relationships. Residents in a certain area may have different perspectives regarding proposed changes in school boundaries, modifications in zoning regulations, or other such matters. Neighborhood disagreements can become quite personal and emotional, as friends begin to think they are being treated disrespectfully. When possible changes in school boundaries or zoning rules are being contemplated, residents may fight hard for the results they prefer.

When neighbors and landlords and tenants are unable to resolve disputes amicably, they frequently resort to legal action as each person fights for the outcomes they desire. Individuals seeking to block school boundary changes or zoning modifications may even take legal action. Such behavior can cause irreparable harm to existing relationships, cost significant sums of money to everyone involved, and delay appropriate changes for prolonged periods of time.

Disputing neighbors usually endeavor to resolve their disagreements through negotiations, but such interactions may fail due to the highly emotional issues involved. Landlords and tenants may encounter similar difficulties. Political leaders may similarly

* Freda H. Alverson Professor, George Washington University Law School. J.D. (1971), University of Michigan; M. Indus. & Lab. Rel. (1968), Cornell University School of Industrial & Labor Relations; B.S. (1967), Cornell University.

seek to elicit the perspectives of residents before they decide to change school boundaries or zoning policies, but find it difficult to generate agreement among the different groups involved. When bargaining interactions do not generate mutually beneficial results, it can be highly beneficial for the interested parties to request the assistance of neutral facilitators.

The inability of disputing parties to achieve resolutions of their competing interests does not mean that they would be better off with no agreement. Inexperienced participants may have failed to initiate meaningful discussions. Each side may have simply been waiting for the other side to raise the subject. Someone may have employed disingenuous tactics that discouraged their counterparts, or the individuals involved may have taken unyielding positions they felt they could not change without looking weak. Communication channels may have been disrupted because of the intense emotional issues involved. These factors may have caused the parties to ignore areas of potential overlap. If these bargaining deficiencies could be alleviated, the participants might realize that mutually beneficial arrangements would still be preferable to impasses.

Some are hesitant to resort to mediation, because they think those sessions will be time-consuming and/or result in the imposition of disadvantageous terms. These concerns are unfounded. The effective use of conciliation can be highly cost effective, because it eliminates the need for protracted litigation. Parties have to appreciate the fact that mediators do not possess the authority to dictate agreements. They are merely empowered to *assist parties* with their own interactions.[1] Neutral intervenors may enhance communication and help parties develop innovative alternatives they may not have considered. The final authority always rests with the parties themselves. No matter how diligently mediators work to generate agreements, the negotiating participants always control their own final destinies since they have to live with whatever they agree to accept.[2]

1. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 2–3 (1st ed. 1994).

2. *See* Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 75–78 (2002).

Disputing parties need to recognize that mediation is basically *assisted negotiation*.[3] Conciliators employ bargaining skills to facilitate inter-party negotiations and to encourage the attainment of mutual accords.[4] Although the bargaining process remains the same as it was prior to mediator intervention, the interaction becomes more complex due to the participation of the neutral facilitator. The parties are no longer simply negotiating directly with each other. They are negotiating with the mediator, through the mediator with each other, and directly with each other with conciliator assistance. Nonetheless, the negotiators continue to exchange ideas and proposals, as they were previously doing alone, and they retain control over any final terms agreed upon.

Successful mediation efforts can significantly enhance the psychological well-being of negotiating parties. The attainment of mutually beneficial agreements enable them to avoid the anxiety, trauma, and uncertainty of litigation. In addition, they are able to work together to formulate their own final arrangements. This is almost always preferable to results imposed on individuals through adjudications or the political process.

This Article will explore the ways in which mediator assistance may be effectively employed to resolve community disputes. It will first consider the different approaches used by most mediators to generate accords. It will then examine how parties initiate mediation intervention, and the importance of doing so in a timely manner. It will consider the types of mediators community disputants should select to assist them with their controversies.

It will also discuss how negotiators and mediators should prepare for their interactions, and how bargaining parties and neutral facilitators should initially interact with one another. In addition, it will explore questions of what mediators should do to create beneficial bargaining environments and consider what techniques mediators should employ at initial sessions to explain the basic rules

3. *See* HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS 67 (2004).

4. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 26–27 (3d ed. 2004).

to be followed, and to enable the participants to express their thoughts and feelings in hospitable environments?

Once the substantive discussions commence, what do mediators do to generate mutually beneficial conversations? How do they induce the participants to explore innovative alternatives they may not have previously considered? When should conciliators contemplate separate caucus sessions that might help them to understand party concerns they might not be willing to express directly with one another? When might it be appropriate for government entities to use regulation-negotiation-mediation to generate final regulations that best satisfy the underlying interests of the competing groups involved? How might victim-offender mediation be employed to generate restorative justice for victim and decrease the likelihood of recidivism by the offenders? Finally, this Article considers rules mediators should follow to avoid ethical difficulties.

II. MEDIATOR STYLES

Effective mediators generally possess a number of common characteristics, no matter which styles they employ.[5] They are objective persons who are aware of their own potential biases. They have excellent communication skills. They are empathetic listeners and assertive speakers. They are active listeners who are adept readers of nonverbal signals. They generally have good interpersonal skills that enable them to interact well with persons from diverse backgrounds. They understand the negotiation process and the way in which they can enhance bargaining interactions. Since they lack the authority to impose actual terms on bargaining parties, they have to rely upon their powers of persuasion and their reputations for impartiality and fairness to help parties achieve their own mutual accords.

5. *See* JAMES C. FREUND, ANATOMY OF A MEDIATION 57–65 (Practice Law Institute) (2012).

Mediators tend to primarily employ one of three different styles.[6] Most are *facilitative*. They work to reopen blocked communication channels and to encourage direct inter-party negotiations that will enable the participants to formulate their own final terms. Some use an *evaluative* style and focus primarily on the substantive terms being discussed. They then endeavor to determine the provisions they think would be most acceptable to everyone, and they work to induce the participants to agree to the packages they have formulated. Finally, an innovative group of conciliators are *transformative*. They endeavor to empower the participants and generate mutual respect that will enhance the ability of disputants to resolve their own difficulties. These styles are not always distinct and separate. Many skilled mediators employ two or even all three approaches when they think the operative circumstances warrant such behavior.

A. Facilitative Approach

Facilitative mediators endeavor to regenerate party-to-party discussions to enable the bargaining participants to structure their own deals.[7] They think that temporary impasses are caused by communication breakdowns and/or unrealistic expectations. They strive to reopen communication channels and to induce negotiators to reevaluate the reasonableness of their respective positions. They ask many questions that are designed to prompt the participants to reconsider their positions and to encourage the parties to explore new areas. Once facilitative intervenors generate meaningful bargaining exchanges, they let the participants decide what terms are best for themselves. They prefer to conduct joint sessions during which the parties engage in face-to-face bargaining.[8] These neutrals rarely resort to separate caucus sessions, except when they encounter crisis

6. *See* DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION 63–92 (2d ed. 2012).

7. *See* MICHAEL L. MOFFITT & ANDREA KUPFER SCHNEIDER, EXAMPLES & EXPLANATIONS: DISPUTE RESOLUTION 85–86 (2d ed. 2011).

8. *See* Carolynn Clark Camp, *Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases*, 26 BYU J. PUB. L. 187, 201–02 (2012).

situations during which the disputing parties are unable to talk directly with one another in a conciliatory manner.[9]

Communication between facilitative mediators and negotiating parties is designed to reestablish meaningful inter-party discussions. They ask questions to get participants to reassess their own positions and to think more openly about the positions being articulated by their counterparts. They almost never offer their own evaluations directly, but accomplish this result through the questioning process. Facilitative mediators are especially appreciated by skilled negotiators who desire minimal bargaining assistance and wish to control their own outcomes. Facilitative intervenors can significantly assist parties with ongoing business or personal relationships to preserve those relationships through effective problem-solving procedures.

B. Evaluative Approach

Evaluative mediators are frequently used to assist relatively inexperienced negotiators who have difficulty achieving their own agreements.[10] These neutrals usually encounter individuals who either do not know how to initiate meaningful bargaining interactions or are unable to explore the relevant issues in a manner likely to generate mutual accords. As a result, these intervenors feel the need to control the situations they encounter. Evaluative mediators can also help even proficient negotiators overcome seemingly irreconcilable issues blocking ongoing negotiations.[11]

Evaluative mediators like to use separate caucus sessions during which they explore the underlying interests of each party outside the presence of persons on the other side. They initially ask many questions designed to let them know what each side needs to achieve. Once they feel they have a sound understanding of the relevant terms, they put together packages they think will optimally serve the interests of everyone. They then employ a direct approach to let each side understand the terms they think everyone should accept. When

9. *See* DEBORAH KOLB, THE MEDIATORS 46–47 (1983).
10. *See* MOFFITT & SCHNEIDER, *supra* note 7, at 86–87.
11. *See generally* FREUND, *supra* note 5.

participants object to suggestions they make, these neutrals try to convince those persons that the proposed accord would be the best they could hope to achieve. Although some parties may think that such intervenors are trying to impose their own values on the negotiators, this is not correct. They work diligently to appreciate the different party values involved and to formulate terms they believe would optimally suit everyone. The agreements they propose are thus based entirely on the underlying interests of the bargaining participants.

Negotiators who are uncertain regarding the appropriate way for them to achieve mutually acceptable agreements and who desire substantive guidance from experienced neutrals may appreciate the assistance provided by evaluative mediators. They should carefully select substantive experts who are likely to understand their particular interests, and work with them to craft terms that best satisfy the objectives of each of the parties. They must always remember, however, that they do not have to accept any recommendations made by evaluative mediators, and can continue to explore other options they may prefer. Parties who prefer to control their own destinies do not usually feel comfortable with such evaluative intervention.

C. Transformative Approach

In their thoughtful 1994 book, Robert Baruch Bush and Joseph Folger explored a novel approach to mediation.[12] They rejected the traditional facilitative and evaluative mediation styles in favor of a more relationship-oriented approach designed to transform disputing parties into relatively self-sufficient problem solvers. They believe that many persons have difficulty negotiating with others because they feel they have no meaningful power to influence the bargaining outcomes. Individuals may also find it difficult to appreciate the underlying interests of the persons with whom they must deal.

Transformative mediators strive to empower weak-feeling parties by demonstrating the rights and external options available to those

12. BUSH & FOLGER (1994), *supra* note 1. *See also* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (rev. ed. 2005) (responding to assessments of their first book).

persons both through settlement and non-settlement alternatives. They also work to help the participants understand the positions taken by their counterparts and recognize—even if they do not accept—the validity of those positions. They believe that empowered individuals, who are aware of their non-settlement alternatives and who appreciate the viewpoints of their counterparts, can optimally work to achieve their own mutually beneficial solutions. Even when immediate accords are not attained during transformative intervention, Bush and Folger maintain that empowered parties will be better able to handle future bargaining interactions due to their new-found problem-solving skills.[13]

Unlike facilitative and evaluative mediators who are particularly interested in resolutions of the underlying disputes, transformative conciliators are primarily interested in future party relationships. Even though they may be pleased when their efforts generate current agreements, they prefer to help disputants understand how they can effectively resolve their own future controversies. To accomplish this objective, transformative intervenors focus on two basic issues: party *empowerment* and inter-party *recognition*.[14] When a party feels impotent, transformative mediators work to show that party that they possess the power to order their relationships. For example, if the current discussions do not prove fruitful, parties can assert their rights in court or do business with other parties. Transformative mediators simultaneously endeavor to generate inter-party empathy by inducing each side to appreciate the feelings and perspectives of their counterparts.

The transformative style has become especially popular with family law specialists, who often encounter unequal relationships due to economic inequalities or physical or emotional abuse. The victims of such relationships may feel that they lack any bargaining power and must give in to the demands of their significant other. Good transformative mediators can help such persons appreciate the fact that they do not have to give in. They can go to court and seek fair

13. BUSH & FOLGER (2005), *supra* note 1, at 22–39.
14. *Id.* at 22–39; BUSH & FOLGER (1994), *supra* note 1, at 20–21.

resolutions of the underlying issues. Once they feel empowered, they can participate meaningfully in the facilitated discussions.

III. INITIATING MEDIATION PROCESS

The timing of initial mediation efforts can be critical with respect to community disputes. If neutral intervention begins prematurely, the conflicting parties may be unreceptive. They may not be sufficiently prepared to participate meaningfully in mediation sessions. On the other hand, if conciliatory efforts begin too late, the bargaining participants may be locked into unyielding positions that would be difficult for them to alter.

When neighborhood disputes arise, the interested parties generally become involved rather quickly. For example, if one person decides to alter his or her property in a way that agitates the neighboring residents, and these neighbors confront the actor as soon as they learn of his or her plans or changes. A landlord may disagree with what a tenant has done to the premises, or a tenant might be upset about what a landlord has not done to correct a situation. These parties may endeavor to work out an arrangement that might be acceptable to the relevant persons, and their negotiations might prove fruitful. When it becomes clear, however, that direct discussions are unlikely to generate a mutually agreeable solution, expedient mediator intervention can be beneficial. If the parties wait too long, the most serious damage may be done—and can be difficult to undo.

The selection of an appropriate neutral facilitator can be critical. Should the parties seek a facilitative, evaluative, or transformative intervenor? Should they choose someone they know from their neighborhood who does not have a direct interest in the issues being disputed or an outside neutral? If specific legal issues are involved, such as property borders or the legal propriety of new fencing or the removal of healthy trees or shrubs, it might be helpful to select an evaluative neutral with legal knowledge needed to help the parties appreciate the related law. That mediator could research the relevant property records, the zoning regulations, or other similar documents to determine the correct property line or the propriety of changes to existing properties. They may then feel comfortable providing the disputing parties with their view concerning the applicable rules. If

they are respected experts, the disputants might yield to their interpretations.

In many cases, the legal rules are not clear. In such cases, it might be best to select a facilitative intervenor, who will work closely with the disputants to help them generate mutually acceptable final terms. Such intermediaries would conduct joint sessions during which they would encourage the disputants to negotiate with each other to explore their underlying interests. The neutrals would ask many questions designed to induce the participants to open their minds to various alternatives that might be mutually acceptable.

Where some of the people involved with neighborhood controversies feel a lack of control over the issues in dispute, it may be most appropriate to seek the assistance of transformative mediators. This type of intervention is especially appropriate for highly personal controversies that generate strong emotional feelings. This can be quite frequent when the disputing individuals live next to each other. The adversely affected persons may think they have no recourse, and they may have extremely negative feelings toward the responsible actors. Although such persons would not wish to have evaluative mediators try to tell them what the outcomes should be, they would welcome assistance that focuses on ways to preserve their relationships. The intervenors might explore ways in which the adversely affected parties could seek relief through government departments or legal actions, in order to demonstrate that the dissatisfied persons actually possess some real bargaining power—that they do not have to give in to the situations they face. These mediators would also work to induce the disputing parties to appreciate each other's perspectives. Why is the actor contemplating the action in question or has already taken the action being challenged, and why are the neighbors so concerned about what is being contemplated or has been done?

Proficient transformative mediators often help disputing neighbors appreciate the different interests of the people involved and induce them to explore innovative options that might satisfy all of their concerns. The initial actors might be convinced to apologize to their neighbors in a manner that would alleviate the overall tensions involved. It is much easier for the disputants to begin to work

together in a more objective manner once the highly emotional atmosphere is diminished.

IV. PARTY AND MEDIATOR PREPARATION

Parties involved in disputes frequently fail to appreciate the fact that mediation is *assisted negotiation*. As a result, they may go to conciliation sessions unprepared. This lack of planning can cause them to be less forthcoming and less forceful. It also undermines the capacity of the neutral intervenors to perform their functions effectively.

Parties should prepare for mediation sessions as thoroughly as they would for any bargaining encounter.[15] They should be familiar with the relevant issues, and understand what they hope to get for themselves. What resolutions would they prefer over their non-settlement options? When they consider the economic and psychological costs of possible litigation, they should appreciate the fact that compromise might be preferable to continued conflict. They must also have sought to place themselves in the shoes of the other persons involved in order to appreciate the different perspectives those individuals would likely bring to the bargaining table. This process not only enables them to have a greater understanding of other's interests, but also helps them consider possible resolutions that might effectively satisfy the all parties' concerns.

Participating disputants should also endeavor to learn about the mediation style of the selected conciliator. Is that individual primarily facilitative, evaluative, or transformative? Do they tend to be active or passive leaders of the bargaining interaction? Will they ask general questions or highly specific inquiries regarding the underlying issues? It is important for the disputing parties to ask these questions, So that they are prepared to work with their mediator's style and engage in an effective negotiation.

It is similarly important for designated neutrals to prepare for their bargaining encounters. They should try to determine the operative facts and the underlying interests involved. What is it that the parties

15. *See* DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 233–64 (2d ed. 2011).

are disputing, and what options might be available to resolve their conflicting positions? When neighbors are fighting over land borders or zoning issues, it can be helpful for the neutral facilitators to obtain the relevant property descriptions or zoning regulations. Such information can help them plan for the way in which they should approach the discussions they will conduct.

V. PRELIMINARY MEDIATOR-PARTY CONTACT AND CONDUCT OF INITIAL MEDIATION SESSION

When parties first select a mediator, or when a community organization or government entity appoints a neutral intervenor, the parties either contact that person or that individual contacts them. This is the point at which many parties first learn about the potential role to be played by the mediator, and the neutral facilitator initially learns about the matter in dispute. It is imperative that these contacts be handled in a manner that avoids any appearance of partiality.[16] One party may telephone the mediator to inform them of their appointment and to schedule the first meeting. The mediator may be the one to initiate this process by calling the interested parties one at a time or by way of a conference call.

Some mediators may feel uncomfortable discussing the issues in dispute with one party without the participation of the other participants, but experienced neutrals usually believe that such ex party discussions are not improper. Unlike judges or arbitrators who have the authority as adjudicators to impose terms on the disputing parties, mediators completely lack such authority. As a result, most feel comfortable conducting detailed talks with each party separately from the outset to enable them to immediately begin their learning process. They should inform the individuals participating in such separate exchanges that the information provided by such persons will not be shared with others involved in the controversy without their consent. This procedure enables mediators to learn the various perspectives from the relevant parties before they schedule formal sessions. The mediators can learn about the specific interests of each

16. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 85–101 (3d ed. rev. 2003).

side, and can begin to manage the expectations those parties may have with respect to what they hope to achieve through the mediator facilitated bargaining process. They can also use these separate exchanges to prepare the participants for the subsequent joint sessions by helping them to frame the underlying issues in a manner other participants would be likely to find appropriate and not offensive.

Mediators generally prefer to conduct the initial joint session at a neutral location—either the mediator's own office or at another non-party site. They reasonably fear that if they meet at the home or office of one of the disputants, the other may feel intimidated or disrespected. Nonetheless, on some occasions disputing neighbors may agree to meet at the home of one of the participants simply because it is convenient for everyone.

When mediators provide the location for the meeting, they should choose their setting carefully. An ideal meeting room has sufficient space to accommodate all of the participants, enough privacy to preclude unwanted interruptions, and ample external space for separate caucus sessions. The furniture should be arranged in a non-confrontational configuration.[17] When bargaining adversaries who have been unable to achieve mutual accords interact, they tend to sit directly across from one another in highly combative positions. They frequently sit with their arms folded across their chests and with their legs crossed—highly unreceptive postures. Such postures strongly suggest that they are not especially open to resolution of their conflict through the bargaining process.

Neutral facilitators should endeavor to create more conciliatory atmospheres. Mediators should make sure the disputants initially shake hands and take seats that are not directly across from one another. A round or oval table may be used, with the mediator on one side and the disputants situated relatively close to each other along the same portion of the table. If a square or rectangular table is used, the parties should be encouraged to sit next to one another along the same side or in an "L" configuration with one along the long side and the other along the adjacent short side. Whenever possible, the

17. *See id.* at 154–56.

participants should be encouraged to address each other on a first name basis, to reinforce the informal and personal nature of the interaction. It is generally easier for individuals to disagree with impersonal opponents than personalized adversaries. The creation of positive environments through such efforts can increase the likelihood of cooperative behavior and decrease the probability of adversarial conduct.

Mediators should assume control over the sessions.[18] Someone must determine how the discussions are going to be conducted, and the neutral parties are in the best position to accomplish this. If they fail to assume a leadership role, the negotiations may deteriorate into unproductive adversarial exchanges. The establishment of mediator control also enhances the capacity of the neutral intervenors to generate discussions that would most likely raise beneficial results. Mediators should assume an optimistic demeanor that encourages the disputing parties to think of settlement as a mutually beneficial outcome.[19]

Once the parties are comfortable, the mediator should explain the mediation process. This is especially important when inexperienced parties are present, as they usually are with respect to neighborhood disputes. The neutral intervenors should emphasize their impartiality and the fact they lack the authority to tell any participant what to do. This is important, because many individuals who participate in mediated discussions may feel that they lack control over the outcomes that may be achieved.[20] The neutrals should emphasize that mediation is not a win-lose endeavor, but rather a win-win form of assisted negotiation. The mediators are merely present to encourage inter-party bargaining and to facilitate the exploration of alternative proposals. The parties will have the final say with respect to any terms that might be agreed upon. The mediator should further explain the use of joint sessions and the possible use of separate caucus sessions to promote the conciliation process. When necessary, the

18. *See* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 26–27 (1996).

19. *See id.* at 77.

20. *See* Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 183–84 (2002).

mediator may articulate behavioral guidelines that will be employed to ensure full party participation in an orderly and constructive manner.[21]

It is important for neutral facilitators to recognize that individuals who participate in conciliated discussions judge the fairness of those procedures not only by the substantive terms agreed upon but also by their perception of the procedural fairness involved.[22] "The presence of four particular process elements result in heightened perceptions of procedural justice: the opportunity for disputants to express their 'voice,' assurance that a third party considered what they said, and treatment that is both even-handed and dignified."[23] Mediators should always emphasize the fact that the disputants will have the opportunity to express their concerns fully in circumstances that guarantee careful consideration by both the other disputants and the neutral facilitators. They should also make it clear that the mediation process will be completely even-handed and conducted in a dignified and impartial manner.

Confidentiality is a critical aspect of mediation endeavors so that the disputants can speak openly about their interests, concerns, and desires. If they were to think that their candid disclosures could be used against them in subsequent proceedings, few would be forthcoming and little progress could be made. This is why neutrals must emphasize the fact that all of the discussions conducted during the conciliation process will remain confidential and may not be used in any legal proceedings that might occur if settlements cannot be achieved. Confidentiality is also crucial with respect to any disclosures made during separate caucus with the mediator, and neutral facilitators should emphasize the fact that no such information will be shared with others without the express consent of the speakers involved.

---

21. MOORE, *supra* note 16, at 219–20.

22. *See generally*, Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 140–41 (2010); Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010).

23. Welsh, *supra* note 20, at 185.

A. Having Disputants Summarize Their Positions

Once they have established the basic guidelines, mediators usually ask the parties to summarize their respective positions. Each side is given the opportunity to accomplish this objective free from counterpart interruptions.[24] Whenever one participant objects to something being expressed by someone else, they are gently, but firmly, told that they will have the opportunity to express their own views once this party has finished speaking. Mediators should carefully listen for hidden agendas that are not being discussed, but will have to be addressed before mutual accords can be achieved.[25]

Mediators need to appreciate the different types of interests being expressed. Some party interests will relate to the substantive issues that are being discussed. How do the participants seem to want the relevant matters resolved? Others party interests may relate to psychological issues underlying their emotional needs, such as a desire for neighborly respect or sympathy. These matters may be disclosed during cathartic expressions that enable the participants to indicate how they feel regarding the way in which they have been treated.

"Active listening" is the optimal way for mediators to enhance party disclosures.[26] Nonjudgmental yet empathetic interjections such as "I understand," "I see," "um hum," etc. can be employed to encourage participant openness.[27] Warm eye contact and an open face can also be beneficial. This approach encourages the disputants to openly express their underlying feelings and beliefs in a relatively sympathetic atmosphere.[28] They appreciate the fact the mediator is actively listening to their concerns, and each party feels that the other participants are finally being compelled to appreciate their perspectives.

---

24. MOORE, *supra* note 16, at 229.

25. *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 42–43 (1984).

26. GOLANN, *supra* note 18, at 75–76.

27. MOORE, *supra* note 16, at 175–77.

28. *See* David A. Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297, 320 (2011).

When emotionally-charged controversies and relationships are involved, as they often are with respect to neighborhood disputes, cathartic "venting" may dispel the tensions and emotions that are preventing real problem-solving and preventing the objective consideration of possible solutions.[29] Mediators should allow the venting in an environment that is likely to minimize the creation of unproductive animosity.[30] While candid feelings should be encouraged, intemperate personal attacks should not be tolerated. Participants should be helped to reframe extreme statements to make them more palatable to the others involved.[31] Once all of the disputants have been allowed to participate fully in the cathartic process, they may be able to put their emotional baggage aside and get on with more productive discussions. On some occasions, it can be especially beneficial for parties who may have acted offensively to apologize for their conduct. A sincere apology can significantly reduce underlying tension and advance the substantive talks.

B. Exploring Innovative Settlement Alternatives

Disputants who have reached an impasse during their negotiations frequently focus exclusively on their own stated positions and ignore other possible options. None of the participants may be willing to suggest new alternatives, for fear of being perceived as weak. Neutral facilitators can significantly enhance the bargaining process by encouraging the parties to explore other possibilities in a non-threatening manner under circumstances that do not require anyone to make overt concessions.[32] If the way in which particular issues are phrased seems to impede open discussions, the mediator can either reframe them in a manner the disputants all find palatable or divide those issues into manageable subparts.[33]

---

29. JAY FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW 300–01 (2d ed. 2011).
30. PETER D. LADD, MEDIATION, CONCILIATION AND EMOTIONS 35–60 (2005).
31. *Id.* at 35–37.
32. *See generally* MOORE, *supra* note 16, at 252–68.
33. *Id.* at 236–42.

Once the fundamental issues have been clearly expressed, mediators should work to generate an effective needs and interests analysis. Through the use of thoughtful inquiries, the neutral intervenors can induce the disputants to explore their underlying interests and the possible ways in which those interests might be satisfied. Mediator patience is vital during this stage, because it takes time for disputants to move from the adversarial mode to the cooperative mode. If neutral facilitators try to rush things, the disputants may dig in their heels and the problem-solving process may break down. Once relatively cooperative communication has been reestablished, conciliator silence, accompanied by supportive smiles and gestures, may be sufficient to encourage the parties to engage in meaningful bargaining. When necessary, the interjection of non-threatening inquiries and suggested options may be employed to maintain a positive brainstorming environment.

Reasonable substitutes for articulated demands should be sought during these brainstorming sessions. The parties should be encouraged to think of options that might satisfy the underlying needs and interests of everyone involved.[34] They need to engage in cooperative problem-solving designed to generate win-win results.[35] Significant issues must be distinguished from less important matters, and the participants must be steered to focus primarily on those topics that must be resolved if a final accord is to be achieved. How might the critical needs of each participant be satisfied by different options? Which alternatives acceptable to one side would least trammel the interests of the others?

Joint conciliation sessions do not always move inexorably toward agreements. Mediators must be cognizant of those verbal and nonverbal signals that indicate that the joint meetings are approaching an irreconcilable impasse. For example, perhaps the participants are placing exaggerated emphasis on unyielding positions. They may have changed their seating arrangement from a cooperative setting to a more confrontational configuration. They may be wringing their hands and/or gnashing their teeth in utter

34. James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263, 328–42 (2013).

35. *See* Camp, *supra* note 8, at 205–06.

frustration regarding the lack of progress, or they have crossed their arms and legs in a wholly unreceptive manner. When a mediator perceives these negative signs, it may be time to suggest separate caucus sessions.

VI. CONDUCTING SEPARATE CAUSUS SESSIONS

Since separate encounters can only be effective when undertaken with the cooperation and confidence of the participants, it is best to ask the parties if they would be amenable to such an approach. If one side was really opposed to such sessions, it would be unlikely that they would be productive. In most instances, the participants readily consent to separate caucus sessions, and their commitment to this process enhances the likelihood of success.

Mediators considering the use of separate sessions should explain at the joint session that they would like to explore the issues with each side individually. They should emphasize the fact that they do not intend to support any side. They merely wish to explore the underlying needs, interests, and objectives of the different participants in an environment that may be more conducive to candor than joint meetings. They must make it clear that any disclosures made by participants during private caucus discussions will not be disclosed to others, without the express consent of the persons involved.

When mediators first meet with each side separately, they should reiterate that they will not disclose specific information provided to them without participant consent. They should then ask a crucial question: what should they know that they were unable to learn during the joint sessions? This question must be expressed in an open and non-threatening manner to encourage the desired candor. Disputants are frequently willing to divulge information to conciliators in confidence that they would be unwilling to disclose in the presence of the others. Mediators should avoid putting participants on the defensive by asking them to defend their prior behavior. Individuals who are asked *why* they have or have not done something may withdraw from the conciliation process. It is amazing how often disputants will indicate their receptivity to options that have not yet been explored when speaking alone with a neutral.

It can sometimes be beneficial to employ conditional offers to generate real position changes. For example, someone strongly objecting to an eight foot fence constructed by a neighbor between their homes might be asked if they might allow a shorter fence or one with open spaces in it. When the mediator meets with the party who constructed the fence, they might ask if they might be willing to shorten the fence or have open spaces between the posts. Someone who is angry about a beautiful tree or bush that was removed by a neighbor along the property line might be asked if they would be willing to replace that plant with one of their own. If they seem amenable to such an arrangement, the party that removed the tree or bush might be asked if they might assume some of the costs associated with such a replacement.

Early in separate caucus sessions, it can be helpful to ask the participants what negative effects they associate with the settlement options before them. One or both parties may believe that a negotiated agreement on the current issues may hurt their bargaining position for another matter involving the same participants, or will adversely affect some other neighborhood relationship. For example, one party might fear that a realignment of the property line between their property and one neighbor may affect a fence they erected between their property and that of another neighbor, or that if they were to modify the trees or shrubs on one side of their property, they would have to do so on the other side. A landlord may fear that a modification of one rental unit might oblige it to make similar changes to other units.

If these concerns are well founded, they will have to be addressed before any resolution of the immediate controversy can be generated. For example, this party's other neighbors might have to be contacted to see whether they would like to reassess their property lines or wish to have this party modify their growths in a similar manner to the way in which they are thinking of changing the plants near the other neighbor. A landlord may have to ask if other tenants desire similar changes in their units.

It is not unusual for mediators to conclude that the fears expressed by bargaining parties are unfounded. It may be unlikely that the property borders on the other sides of this property are incorrect, and there may be no need to change the trees or plants on the opposite

side of the house if they are modified on the immediate side. By thoughtfully assessing the likely consequences of bargained results in the instant matter, parties can alleviate the anxiety preventing a mutual resolution of the current difficulties.

While meeting separately with the relevant participants, mediators should look for possible intra-group difficulties that might impede settlement discussions.[36] Which constituencies must be satisfied before any agreement can be finalized? What are the underlying interests of the different participants, and how might they be addressed? Are all of the interested parties present at the bargaining table? If the current participants are endeavoring to alter the rules pertaining to gardening practices within an expanded area, the views of everyone who might be affected should be elicited. While some might be quite amenable to the changes being considered, others might have objections that must be addressed. If this is the first house in this neighborhood that would have a fence between it and a neighbor, would this open the door to other similar fences?

During some separate caucus sessions, some participants may continue to assert wholly unreasonable demands. If mediators were to directly challenge those perspectives, the affected parties would be likely to become defensive and even more intransigent. It is usually more productive for the neutral facilitators to explore these positions in a nonthreatening manner. This can best be accomplished through the use of probing questions.[37] The conciliator can explain how helpful it would be for them to fully comprehend the way in which that party has formulated its present position. They want to induce that person to break down their overall demand or offer components that must be valued on an individualized basis.

The inquiries should initially pertain to the more finite aspects of that party's position to leave them minimal room for exaggeration. One neighbor may claim that a fence being erected by another neighbor will cause the value of their property to be reduced by $100,000, when it would be unlikely to have an impact beyond

36. KARL A. SLAIKEU, WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES 24–25, 56–57 (1996).

37. JOSEPH B. STULBERG & LELA P. LOVE, THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY 104–05 (2d ed. 2013).

$10,000. A party might be saying that a change in neighborhood gardening practices would cost it $5,000 to comply with, when the actual figure would be in the $1,500 range. An objective exploration of these relatively definitive costs can significantly diminish the expectations being expressed by such participants.

Once the objective issues have been explored through such inquiries, the conciliator may have to address some subjective concerns. Someone might think that the view from their living room would be much less appealing due to what a neighbor has done or is thinking of doing. They might greatly exaggerate the emotional costs associated with such factors. If their concerns could be explored in an unemotional and relatively objective manner, they might calm down and be more receptive to options being considered.

When disputing parties reach an impasse, they are usually focusing almost entirely on their area of disagreement. As a result, they frequently fail to consider other options where their interests might overlap. Mediators should look for issues in which the interests of the disputants are not directly opposite. For example, an individual fighting a neighbor about a fence that neighbor wants to erect may be more amenable to that fence if the neighbor agrees that no tree limbs will be allowed to grow over the fence into the objector's property. The erecting party may be perfectly willing to agree to trim any limbs that cross over the fence, thus alleviating this party's concerns in this regard. Once issues such as this are resolved, it can become easier to resolve the basic question being explored.

VII. REGULATION-NEGOTIATION-MEDIATION

When county or municipal entities oversee particular areas, such as school district boundaries or zoning regulations, the adoption of new provisions or the amendment of existing rules can be protracted, contentious, and expensive. Administrative procedure statutes usually require publication of proposed regulations, public hearings, and documented agency deliberations. Once this process is completed and new or amended regulations are issued, adversely affected parties frequently seek judicial intervention. The resulting court proceedings may continue for several years.

When contentious issues are involved, the regulatory process is usually protracted. This is almost always true when controversial environmental, school boundary, or visible zoning modifications are involved. Some government officials have begun to recognize that it may be advantageous to use the negotiation process prior to the regulation adoption stage to avoid the need for subsequent administrative and judicial proceedings. Instead of merely publishing proposed regulations, agencies initially determine the interest groups most likely to be affected by the contemplated rules. Representatives of these different groups are then asked to participate in what has become known as a "regulation-negotiation proceeding"—a "reg.-neg. proceeding" for short.

Despite the reg.-neg. characterization, most regulation-negotiation proceedings are really "regulation-negotiation-mediation" proceedings, due to the critical participation of neutral facilitators. Respected neutral experts are asked to solicit the participation of the relevant interest groups. This process can only function effectively if all interest groups are adequately represented. It is thus better to err on the side of inclusion, rather than exclusion.[38]

Once the diverse participant groups have been selected, the neutral facilitators attempt to elicit the information they need to determine and define the operative issues that must be addressed. When technical environmental or educational issues are involved, respected experts may be asked to provide their insights. The individuals selected must be viewed as wholly unbiased and generally acceptable among the different groups if their opinions are to be persuasive.

When expansive questions must be overcome, it can be beneficial to appoint subcommittees comprised of representatives from each group. These subcommittees can focus on specific issues or narrow groups of issues. They endeavor to agree upon the precise problems that must be explored and look for mutually agreeable alternatives. It is especially important for the participants to explore options that minimize the adverse impact on any group. Even if the final terms are

38. *See* Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 429–31 (2003).

not "perfect" for any constituency, provisions that are generally acceptable to everyone may prove more important to the overall success of the reg.-neg.-med. process.

Neutral facilitators must ensure that each group's interests receive thoughtful consideration. This helps to generate mutual respect among the different participants and is conducive to the development of amicable solutions. If diverse participants can be induced to appreciate the concerns of opposing parties, this can significantly reduce distrust and enhance the dispute resolution process. The use of a single-text approach can be especially beneficial during reg.-neg.-med. discussions, to minimize problems that might otherwise result from the presence of contradictory and contentious issues. The neutral facilitator includes the perspectives of the different parties in a single document, which enables that person to control the basic agenda to be addressed

Once the participants have had the opportunity to define the relevant issues and assess the options available to them, they must begin to look for common ground. Whenever possible, decisions should be made by consensus, rather than by majority vote. Even when most of the participants support a particular proposal, if a meaningful group is unalterably opposed to that suggestion, it may be able to prevent the adoption of that provision or delay the effectuation of that term through protracted litigation. It thus behooves the parties to respect the rights and interests of all representative groups.

When mutually acceptable regulations or rules are drafted, they are recommended to the governing body for final approval. Even when no overall agreement can be achieved, the reg.-neg.-med. process may narrow the pertinent issues and induce the different groups to agree upon numerous factual matters. If these ideas are carefully considered by the governing agency during the formal rule-making process, it decreases the likelihood of subsequent legal challenges by parties dissatisfied with the promulgated rules or regulations. Furthermore, even if litigation were to occur, a prior narrowing of the factual and legal issues would make the resulting legal proceedings more efficient. The enactment of the Negotiated

Rulemaking Act of 1990 encouraged federal agencies to make greater use of the reg.-neg.-med. Process.[39] The basic provisions of that temporary statute were permanently codified in the Administrative Dispute Resolution Act of 1996.[40]

VIII. VICTIM-OFFENDER MEDIATION

Over the past three decades, a number of communities have developed victim-offender mediation programs ("V-O MED") to help resolve personal theft and relatively minor assault cases.[41] These programs use specially trained neutral facilitators to bring crime victims and their offenders together in safe environments. V-O-MED procedures are only employed if both the victims and the offenders agree to participate.

Mediators initially communicate with the victim alone to explain V-O MED procedures, and to determine if the victims would feel comfortable meeting with the persons who harmed them. The neutral facilitators explain the cathartic process, which is associated with such programs, and the way in which the sessions will be conducted.[42] The facilitators also communicate with the offenders to discuss how mutually beneficial it might be for them to admit their culpability to their victims and to explore possible ways for them to rectify the situations they created.

At the joint sessions, the parties usually sit across from each other on the opposite sides of square or rectangular tables to provide victims with a reasonable sense of security.[43] The facilitators carefully explain the mediation process and how the V-O MED will proceed. Victims are given the opportunity to express their feelings regarding the impact of offender actions on their personal lives. This

39. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561–570 (2012)).

40. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified as 5 U.S.C. §§ 571–584 (2012)). JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 171 n.114 (4th ed. 2006).

41. *See generally* MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION (2001); OFFICE FOR VICTIMS OF CRIME, DEP'T OF JUSTICE, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION (2000).

42. UMBREIT, *supra* note 41, at 38–40.

43. *Id.* at 23.

can be an especially cathartic process. Individuals who felt powerless when the crimes occurred now feel empowered regarding their capacity to express their feelings directly to the offenders.[44] The offenders are given the opportunity to explore possible ways they might provide some restitution for the property they stole or the physical injuries they inflicted. If they do not have the money to compensate the victims, they might agree to provide personal services for them and/or to perform some community services.[45] It can be highly restorative for offenders to apologize to the victims for what they did to them.

Mediators who facilitate V-O MED sessions tend to employ the transformative approach.[46] They endeavor to *empower* the victims to express their feelings openly. They also work to get offenders to *recognize* the emotional feelings of the victims—and to even get the victims to understand the personal circumstances that may have caused the offenders to do what they did.[47] Victims who participate in V-O MED programs tend to feel much better than victims who simply see their offenders convicted in judicial proceedings due to the restorative justice they experience.[48]

Once V-O MED interactions have been completed, victims generally feel vindicated, and plea bargaining arrangements can be formulated between defense counsel and prosecutors which result in less significant levels of punishment than would have resulted if the cases had gone to trial.[49] If offenders have already pleaded guilty, or have been convicted, and sentences have been imposed, their successful participation in V-O MED sessions may enable them to have their penalties reduced.[50] V-O MED programs are particularly beneficial where juvenile offenders are involved, because it may enable such individuals to modify their future behavior in a manner that reduces the likelihood they will become recidivists.[51]

---

44. *Id.*
45. *Id.* at 42–43, 168–69.
46. *See id.* at 6–8.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *See id.* at 211–12.

IX. ETHICAL CONSIDERATIONS

For many years, the conduct of most private mediators was virtually unregulated. Attorney mediators were minimally affected by the Code of Professional Responsibility or the more recent Model Rules of Professional Conduct.[52] Neutral facilitators from other disciplines were governed by their own ethical codes.[53] It was generally recognized that while mediators might emphasize different aspects of proposed agreements to each side to induce them to focus on the terms most beneficial to each, any overt deception would never be appropriate.[54] Although mediators may reframe offers received during separate caucus sessions to make them seem more palatable to the individuals on the other side, they may not misrepresent the true nature of such offers to deceive the offer recipients into believing that the offers are more generous than they actually are.[55] Such deliberate deceit would destroy the integrity mediators require to function effectively as neutral facilitators and would completely undermine party respect for the mediation process.

States did not prescribe any detailed standards for individuals who desired to serve as neutral intervenors.[56] As long as particular individuals were acceptable to disputants, they could work as conciliators. Even states with basic prerequisites only required a minimal amount of specialized training.[57] Although public and private appointing agencies usually listed only persons with mediation experience, it was not difficult for most applicants to qualify.

By the early 1990s, the laissez-faire approach to mediator regulation began to change. Dispute resolution neutrals increasingly

52. *See* FOLBERG & TAYLOR, *supra* note 25, at 252–55.

53. *See id*. at 250–51.

54. *See generally* John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1 (1997); Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3 (1995).

55. *See* Kimberlee K. Kovach, *Musings on Idea(l)s in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education*, 21 OHIO ST. J. ON DISP. RESOL. 123 (2005).

56. *See* FRENKEL & STARK, *supra* note 6, at 303.

57. *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE § 11.04 (2d ed. 1994).

thought of themselves as part of a distinct profession, and they began to appreciate the need for separate professional standards.[58] Nonetheless, they were uncertain regarding the appropriate way in which to promulgate generally applicable behavioral rules and were concerned about the extent of regulation that should be imposed.[59]

Finally, in 1994, the American Arbitration Association (AAA), the American Bar Association (ABA), and the Society of Professionals in Dispute Resolution (SPIDR) adopted "The Standards of Conduct for Mediators" (the "Standards").[60] In 2005, these three organizations completed a three-year review process that generated some changes in the specific language of the different sections of these Standards.[61] It is hoped that these regulations will not only guide the conduct of AAA, ABA, and SPIDR (now Association for Conflict Resolution) mediators, but also establish guidelines for state regulators and other private organizations that decide to promulgate their own restrictions.

Standard I acknowledges the principle of party self-determination, not only with respect to actual outcomes, but also with regard to mediator selection and process design based on the belief that party acceptance of neutrals is essential for effective conciliation.[62] Standard II requires conciliators to "conduct the mediation[s] in an impartial manner."[63] Covered neutrals are required under Standard III "to make a reasonable inquiry to determine whether are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest" and "to disclose . . . all actual and potential conflicts of interests that are reasonably known to the mediator" that could raise questions about their impartiality.[64] Individuals being considered for possible neutral appointments should inform the prospective participants about any financial interest they might have

58. *See* MOORE, *supra* note 16, at 447–50.

59. *See generally* Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965 (2004).

60. *See* FRENKEL & STARK, *supra* note 6, at 304.

61. *Id.*

62. *Id.* at 305.

63. *Id.* at 305–06.

64. *Id.*

in any party and indicate any past or present relationships with parties or representative law firms that might be perceived as sources of possible bias. Conciliators should always resolve doubts with respect to possible conflicts in favor of complete disclosure.

Standard IV, merely provides that "[a] mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties."[65] It goes on to note that "[a]ny person may be selected as a mediator, provided the parties are satisfied with the mediator's competence and qualifications." No minimal educational or experiential prerequisites were imposed, in deference to party self-determination. Standard V requires mediators to "maintain the confidentiality of all information obtained by the mediator . . . unless otherwise agreed to by the parties or required by applicable law."[66] It also states that "[a] mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person any information that was obtained during that private session without the consent of the disclosing person."

Standard VI provides that "[a] mediator shall conduct a mediation . . . in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency, and mutual respect among all participants."[67] This provision is designed to guarantee procedurally fair conciliation efforts. Under the 1994 version, conciliators were told to "refrain from providing professional advice," and instructed, where pertinent, to suggest that parties seek their own outside professional assistance. This admonition was designed to avoid the difficulties that might be encountered if neutrals were to offer gratuitous advice to parties regarding the legal ramifications of provisions they might be considering. Although this language is no longer contained in the revised Standards, the admonition is implicit in both the self-determination and impartiality standards.

Standard VI(A)(4) provides that "[a] mediator should promote honesty and candor between and among all participants, and a

65. *Id.*
66. *Id.* at 306–07.
67. *Id.* at 307.

mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation."[68] Throughout both unassisted and assisted negotiations, the participants must determine their own legal rights through appropriate channels. Mediators should thus refrain from providing legal advice to particular parties. Nonetheless, it must be recognized that some neutral intervenors are willing to give their opinion with respect to controverted legal or factual issues. So long as they perform this function as neutral evaluators, and not as legal advisors to specific participants, this behavior would not contravene the Standards.[69]

X. CRITICAL NATURE OF PARTY SELF-DETERMINATION

The overall commitment to party self-determination might be read by some as a repudiation of the evaluative approach in which mediators employ more directive techniques to generate participant agreements. Evaluative conciliators would undoubtedly disagree with this interpretation, emphasizing the fact that they only become more directive after they have determined the needs, interests, and objectives of the participants. To the extent evaluative mediators endeavor to generate agreements consistent with party desires, their efforts should not be considered contrary to the self-determination mandate.

Mediators should not permit the self-determination principle to authorize the acceptance of terms they believe to be truly unconscionable. Community and neighborhood negotiations occasionally involve parties with significant power imbalances due to extreme financial, emotional, or political inequalities. This phenomenon is especially likely with respect to certain neighborhood controversies involving landlords and tenants or wealthy individuals interacting with neighbors with far less monetary support. When conciliators fear that party power imbalances would be likely to generate unfairly one-sided agreements, they should not hesitate to

68. *Id.*

69. *See* MODEL RULES OF PROF'L CONDUCT R 2.4 (2011). In 2002, the ABA adopted Model Rule 2.4(b), which requires attorney-mediators to explain their neutral role to disputants and indicate that they do not represent any party.

advise the weaker participants to obtain legal assistance. If financial constraints would preclude the retention of paid counsel, the individuals could be referred to legal aid organizations or appropriate public interest groups. They could also follow the practice of transformative mediators and point out to weaker parties their right to seek appropriate relief through judicial or political entities. If these suggestions were ignored and the neutral intervenors feared they would be used by the stronger parties to obtain unconscionable terms, they could exercise their right to withdraw from the negotiations. In most instances, the very participation of detached mediators should act as a moderating influence that should discourage the negotiation of wholly one-sided agreements.[70]

XI. CONCLUSION

When neighbors have disputes regarding property borders or gardening plans, landlords and tenants encounter difficulties, or different groups disagree over proposed changes in school boundaries or zoning or environmental regulations, the assistance of neutral facilitators can be highly beneficial. The disputing parties should decide whether they prefer neutrals who are primarily facilitative, evaluative, or transformative. Individuals who feel comfortable with bargaining encounters may prefer facilitative mediators, while persons lacking such skills may prefer evaluative mediators. People who feel they lack the power to interact effectively with their economically or politically powerful neighbors or landlords may prefer the transformative style.

The parties and the designated neutrals must prepare thoroughly for their interactions, in recognition of the fact that mediation is nothing more than assisted negotiation. The designated neutrals must schedule meetings in settings that will not appear to favor any participants. At the initial session, they must explain their neutral role and the confidential nature of the mediation process. They should then elicit party positions and feelings in an empathetic manner. They should encourage the participants to explore ways in which the

70. *See* FOLBERG & TAYLOR, *supra* note 25, at 245–49.

disputed issues might be beneficially resolved. When the participants seem to be moving toward impasses, separate caucus sessions might be employed to regenerate stalled talks.

When issues such as school boundaries or zoning modifications are involved, the use of regulation-negotiation-mediation procedures might be employed to elicit the views of all interested parties and to generate the most acceptable regulations. These reg.-neg.-med. efforts can avoid the costly and protracted litigation, which might follow the adoption of changes if they have not been jointly formulated.

Individuals who have been adversely affected by criminal behavior may be asked if they would be willing to participate in victim-offender mediation programs. Effective programs can help to generate greater victim-offender understanding and result in joint feelings of restorative justice for both the victims and the offenders.

Designated neutrals must conform to basic ethical standards. They must avoid any possible conflicts of interest, respect party self-determination, and conduct their sessions in a professional and fair-minded manner. This would best enable the participants to generate resolutions they feel comfortable to accept.